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RUSSIA: largest social network found liable for copyright infringement by users

ARBITRAZH COURT OF ST PETERSBURG AND LENINGRAD REGION, DECISION OF 15 OCTOBER 2011; 13TH ARBITRAZH COURT OF APPEAL, DECISION OF 21 JANUARY 2013

The Russian courts have adopted a new interpretation of copyright legislation, leading to successful copyright infringement proceedings against the Russian social network VKontakte.

VKontakte is currently the largest Russian social network with more than 100 million users and one of the most visited websites in Russia. It not only provides the usual functions of a social network, such as messaging, profile pages and sharing images, but also serves as a platform for uploading, searching and sharing music and videos. In the past, VKontakte has received several allegations from rights holders of copyright infringement by users posting user-generated content on the platform. Most of these disputes have proven unsuccessful as the rights holders were not able to establish any wrongdoing (required under Russian law), but a recent claim brought by S.B.A./Gala Record found VKontakte liable after the Russian court adopted a new interpretative approach.

S.B.A./Gala Records is the first independent Russian record and publishing label, founded in 1988. In 1998 it became the official representative of EMI Music in Russia. It holds the exclusive rights to various music recordings, including those by the Russian singer MakSim. S.B.A./Gala Records claimed that on the website www.vkontakte.com a number of songs by MakSim were available after having been uploaded by users without their consent. It requested compensation in the amount of Russian Rubles 550,000 (approximately U.S.\$17,000).

The Russian court's approach changed in the way it interpreted the respective legal provisions. Under Russian law, in order to apply measures for the protection of intellectual property rights (e.g. statutory compensation and damages recovery) it is necessary to examine whether the defendant is at fault.

The court held that VKontakte was a commercial body undertaking business activities and that for assessing VKontakte's possible wrongdoing as part of its business activities, it was not necessary to establish whether and to what extent it was VKontakte's fault but only whether an infringement of intellectual property rights was a result of certain acts (or omission).

The court found that S.G.A./Gala Records provided sufficient evidence to establish an infringement of its intellectual property rights by the actions of VKontakte: 1) by developing and introducing software programs for offering a service to users that allowed them to upload recordings owned by right holders and placed on the platform by VKontakte users, as well as 2) by failing to implement sufficient means to prevent unauthorized use of the recordings by the users of www.vkontakte.com.

VKontakte, however, failed to present evidence that it took all necessary steps to comply with its obligation to remove infringing content, taking into account the extent of care and caution which would have been expected.

Under Paragraph 3 of Article 401 of the Russian Civil Code, a person who fails to comply with its obligations as part of its business activities shall bear responsibility, unless she can prove that the compliance was impossible due to circumstances beyond her control. As this was not established, the court found VKontakte to be liable for copyright infringement and ordered the social network to pay S.B.A./Gala Records Russian Rubles 550,000.

The success of S.B.A./Gala Records in this case can largely be based on its ability to establish evidence of infringement of copyright, in particular by providing a protocol of website content certified by the notary. During the trial the court examined the website so it was important to the court's analysis that unauthorized content was not removed from the website prior to the hearing. Also, the claimant provided sufficient documentary evidence to prove its rights in the recordings. These elements confirm that contracts between an artist and a publishing company should not be generic but refer precisely to the particular works under consideration.

Another claim of S.B.A./Gala Records in the same dispute directed against Selektel LLC, a provider of communication services (i.e. in the provider's facilities with a guaranteed power supply, low temperature, security etc.), was dismissed. The court said that the provider had neither technical nor operational capacity to influence the content of the supporting programs of VKontakte. Therefore there were no acts or omissions that infringed the exclusive rights of S.B.A./Gala Records.

On 21 January 2013, the Court of Appeal confirmed the decision and dismissed VKontakte's appeal.

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